

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALAN DUENAZ,

Defendant-Appellant.

UNPUBLISHED

August 18, 2000

No. 214839

St. Clair Circuit Court

LC No. 93-002168-FH

Before: Markey, P.J., and Gribbs and Griffin, JJ.

GRIFFIN, J. (*dissenting*).

I respectfully dissent. I would dismiss for lack of jurisdiction defendant's claim of appeal filed October 6, 1998. MCR 7.204(A)(2); MCR 7.217(A)(10).

I begin by noting that our review is hampered by the non-participation of the prosecuting attorney for St. Clair County. The prosecutor has chosen not to defend against this appeal and failed to respond to our order to show cause in writing why defendant's conviction should not be reversed. Were a jurisdictional issue not involved, my disposition might be different in view of the prosecutor's inactions.

Defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a), for a July 5, 1993, incident, and assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2); MSA 28.788(7)(2), for a July 13, 1993, incident involving the same victim. A judgment of convictions and sentences was signed on February 13, 1995. A motion for new trial was filed on March 27, 1995, and denied on May 10, 1995. Defendant made a request for appellate counsel that was granted on July 3, 1995. The order of appointment of appellate counsel did not include a claim of appeal.

On February 13, 1996, counsel filed an application for leave to appeal challenging defendant's sentences, only. In lieu of granting defendant's application for leave to appeal his sentences, this Court remanded for resentencing on the basis that defendant had not been afforded an opportunity for allocution and had not been furnished a copy of the presentence report on a day prior to resentencing.

People v Richard Alan Duenaz, unpublished order of the Court of Appeals issued 5/9/96 (Docket No. 192764).

At resentencing, the lower court reimposed defendant's original sentences. On October 17, 1996, defendant appealed as of right his sentences. Thereafter, our Court affirmed in an unpublished opinion memorandum issued 2/6/98 (Docket No. 198517).

On August 20, 1998, Terence R. Flanagan, deputy administrator of the Michigan Appellate Assigned Counsel System, wrote a letter to the circuit court advising the judge that due to a mistake made by defendant's previous appellate attorney, defendant's convictions were never appealed by right or by leave to the Court of Appeals. In response to the letter, the circuit court on September 30, 1998, issued a new claim of appeal and order appointing appellate counsel. Defendant's current appeal was filed in the Court of Appeals on October 6, 1998. Thereafter, on March 2, 1999, the circuit court issued an order that purportedly vacated the claim of appeal. The order in its entirety states:

IT IS HEREBY ORDERED that the Claim of Appeal and Order Appointing Counsel (SCAO form CC 403) issued by this Court on September 20 [sic], 1998, is vacated for the reason that the Court is convinced, for the reasons stated on the record, that this matter should proceed under Subchapter 6.500 of the Michigan Court Rules.

IT IS FURTHER ORDERED that, pursuant to MCR 6.505, Rolf E. Berg and the State Appellate Defender Office are appointed to assist the Defendant in the preparation and argument of a motion under MCR 6.502.

IT IS FURTHER ORDERED that the St. Clair County Prosecuting Attorney, as provided for in MCR 6.506, shall respond to any motion for relief from judgment [sic] Defendant files pursuant to this order.

The circuit court denied defendant's motion for reconsideration on March 12, 1999.

After addressing the issue of our jurisdiction de novo, I conclude pursuant to MCR 7.204(2), defendant's October 6, 1998, claim of appeal must be dismissed for lack of jurisdiction. MCR 7.216(A)(10). Defendant's remedies, if any, lie with a motion for relief from judgment, MCR 6.502. In the event such a motion is denied in the lower court, defendant may file an application for leave to appeal to this Court.

I would dismiss.

/s/ Richard Allen Griffin